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HAROLD B. WILLEY, Clerk

No. 468

In the

Supreme Court of the United States

October Term, 1955

TYLER BANK & TRUST COMPANY,
Petitioner,

v.

FRANK CARDER, SR., FRANK CARDER, JR., and BEN SCROGGIN, JR.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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2. The court below has departed so far from the accepted and usual course of judicial proceedings in holding petitioner liable for damages entirely caused by the respondents' own acts as to call for an exercise of this Court's power of supervision.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner, TYLER BANK & TRUST COMPANY, a Texas corporation, prays that a Writ of Certiorari issue to review the judgment and decree of the Court of Appeals for the Fifth Circuit affirming the judgment of the United States District Court for the Eastern District of Texas, Tyler Division.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Texas (R. 17) is not yet reported. The opinion of the Court of Appeals is not yet reported but may be found as Appendix 1 hereto.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was entered June 30, 1955 (R. 271). Petition for rehearing, seasonably filed by petitioner (R. 272), was denied on August 1, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether an automobile dealer whose own acts caused his loss can recover damages therefor from a bank for alleged failure to return drafts in statutory time.

2. Whether drafts with automobile title papers attached sent directly to bank by respondent's agent-bank under instructions "we enclose for collection and remittance when paid" were controlled by Article 342-703 or Article 342-704 of the Revised Civil Statutes of Texas.

STATUTES INVOLVED

Article 342-703, Revised Civil Statutes of Texas, provides as follows:

"Collections-Scope of Agency—Liability of Agents

"The original agent and each subagent, in the course of the collection of an item, shall as agents of the owner of the item, be authorized:

"1. To effect collection by or through: (a) forwarding the item to the drawee, if the drawee is a bank; or (b) forwarding the item to another bank for collection, which bank upon receiving the item shall become a subagent within the purview of this chapter; or (c) presenting the item across the counter of the drawee bank; or (d) presenting the item through any clearing house, or other established and recognized procedure or banking custom.

"2. To receive the check or draft of the drawee, if a bank, or the check or draft of any other bank, as a step in the process of payment of the item.

"3. To receive the check or draft of any subagent or of any other bank as a step in the process of transmitting the proceeds of the item from one agent to another.

"4. To transmit an item or a remittance by mail, express or by any other common carrier in accordance with established banking custom.

"5. To give reasonable instructions not in conflict with law or established banking customs and procedure, relative to the method of collection, payment and transmittal of the proceeds. The original agent and each subagent shall be liable for damages proximately caused by its own negligence, wrongful act, or breach of contract in connection with the collection of an item, in a sum not exceeding the amount of such item, but shall not be liable or responsible for the acts or omissions of any other agent or person or for the loss or destruction of any item or any remittance in the mail or while it is in the hands of any other common carrier or person. Further provided that no agent or subagent shall be deemed guilty of unreasonable delay if it forwards an item or remittance during the day on which it is received or during business hours of the following day. Acts 1943, 48th Leg., p. 154, ch. 97, subch. VII, art. 3."

Article 342-704, Revised Civil Statutes of Texas, provides as follows:

"Collections—Payment—Refusal—Dishonor

"Except where otherwise provided in this Code, or by express agreement of the parties, items presented to a drawee bank shall be received by it, subject to final adjustments and all clearing house settlements, checks, drafts, credits, advances of money, charges or entries to accounts, (including sight posting), shall be conditional and subject to revocation during the day on which the item is presented (or in case of a time item, the due date), or within twenty-four (24) hours after presentment, exclusive of Sundays and holidays, if it is finally determined that the drawee bank was not at the time of presentment (or in case of a time item, the due date) authorized or obligated to pay the item, and if the drawee bank shall within that time refuse payment and return the item, or undertake to give notice in the manner hereinafter prescribed:

"1. If the item is presented across the counter for payment in cash or for deposit in the drawee bank, the drawee bank shall exercise reasonable diligence within the time above prescribed to give notice, by mail or otherwise, to the bank or person presenting the item that it has refused payment and that it holds the item subject to its or his order.

"2. If the item is presented through a clearing house, the drawee bank shall, within the time prescribed, return the item to the clearing house presenting it.

"3. If the item is presented by mail, the drawee bank shall within the time above prescribed deposit the item in the mail properly stamped and addressed to the bank or person presenting the same. The actual receipt of the notice provided under Section 1 above by the bank or person presenting the item, or the actual receipt of the returned item by the person, bank or clearing house, as provided in Sections 2 and 3 above,

shall constitute dishonor within the purview of Article 5938 of the Revised Civil Statutes of Texas. If the drawee bank in refusing payment of any item fails to comply with the provisions of this article within the time above prescribed it shall, at the election of the owner of the item, be deemed to have accepted the item, and shall be liable for the amount thereof. If an item is presented by a bank as agent or subagent of owner, such bank may, in the absence of definite instructions from the owner, exercise the election herein provided for. Acts 1943, 48th Leg., p. 154, ch. 97, subch. VII, art. 4."

STATEMENT

Respondents were automobile dealers in Arkansas. They sold several automobiles to Johnnie Camp, an automobile dealer in Texas. The sales were handled severally but similarly and we will repeat one instance as representative of all.

Respondent delivered a car to Camp's agent in Arkansas together with respondent's invoice showing the sale of the automobile to Camp together with an executed bill of sale therefor from respondent to Camp. Camp's agent then drove the car to Texas and from thence it was transported to Louisiana and was sold to an innocent purchaser by Camp. Respondent, with authority from Camp to so do, drew a draft payable to respondent on Tyler Bank & Trust Company in the name of Camp. Respondent then deposited the draft, with title papers to the delivered automobile attached, in respondent's bank for deposit. Respondent's bank credited respondent's account with the amount of the draft and forwarded the same with title papers attached to its correspondent, the Worthen Bank in Worthen, Arkan-

sas. The latter bank credited the originating bank's account and then forwarded the draft, with the title papers attached, by mail to the petitioner with the following letter of instructions:

> "We enclose for collection and remittance when paid. Please do not hold collections for the convenience of parties. 'Do not protest items of $500 or less. Protest dishonored items of $500.01 or over, except those bearing on their face this stamp (N. P. 81-7) or similar stamp of a preceding bank endorser.' 'Wire (giving name of our endorser) non-payment of all items of $1,000 or over, except those not paid because of missing, irregular or unsatisfactory endorsement and those bearing on their face DO NOT WIRE NON-PAYMENT accompanied by the A. B. A. transit number of this bank or of a preceding bank endorser'."
>
> "Surrender Documents, Bills of Lading, or papers attached only on payment of draft."

Petitioner after receipt of the drafts on September 14, 1953, attempted to collect them but was unable to do so and returned them to the Worthen bank by mail on September 18, 1953. The District Court held that Section 704 of Article 342, R. C. S. of Texas, applied. That respondents were entitled thereby to deem an acceptance by the petitioner of the drafts upon its failing to return the drafts within twenty-four hours. The Circuit Court adopted the opinion of the District Court and affirmed the judgment.

SPECIFICATIONS OF ERROR TO BE URGED

The United States Court of Appeals for the Fifth Circuit erred:

1. In holding that the provisions of Article 342-704, R. C. S. of Texas, were applicable to this case.

2. In failing to hold that the provisions of Article 342-703, R. C. S. of Texas, were applicable to the facts of this case.

3. In failing to hold that respondent's negligence occurring prior to petitioner's failure to observe a statutory requirement precluded recovery.

REASONS FOR GRANTING THE WRIT

As the trial court clearly held, a universal custom among banks existed whereby drafts and commercial paper of the kind at issue herein were handled as collection items. Article 342-703, R. C. S. of Texas (supra), expressly authorized the respondents' agent-bank to effect collection by * * * forwarding the item to another bank for collection * * * presenting the item through any other established and recognized bank custom and to give reasonable instructions not in conflict with law or established banking custom or procedure for the collection, payment and transmittal of the proceeds.

The article then specifically provides that the party so handling the item should be liable only for damages proximately caused by its own negligence. The trial court in this case has held that the petitioner was not guilty of negligence but to the contrary respondents caused their damage by their own negligence. Respondents' own agent-banks forwarded the items at issue to the petitioner by mail and not through regular banking channels or by clearing house procedure. Petitioner never gave credit or in any manner indicated an acceptance of the items. The respondents'

agent-banks forwarded the items by mail to the petitioner with these express written instructions, "We enclose for collection and remittance when paid."

Article 342-704, R. C. S. of Texas, provides, "Except where otherwise provided in this Code * * * items presented shall be received" subject to revocation, provided if the item is presented by mail the drawee bank shall within twenty-four hours return the items. The failure to so return under the circumstances shall be deemed an acceptance at the election of the owner of the item.

The trial court erred in concluding that Article 342-704 applied to all drafts received by a bank which the receiving bank failed to return within twenty-four hours. The Circuit Court in adopting the trial court's decision fell into the same error. There is a clear distinction in the applicability of Article 342-704 and Article 342-703.

Article 342-704 provides that it is not applicable to items otherwise covered in the code or items covered by express agreement of the parties. The trial court's findings of facts (R. 17) clearly show the respondents' agent-bank forwarded the item to another bank for collection and gave instructions which were not in conflict with established banking customs but directly in conformity therewith. These undenied facts bring the facts of this case directly under the terms of Article 342-703. Being transactions otherwise provided for, they were expressly excepted from the provisions of Article 342-704. The latter is the only basis for judgment against the respondent.

In its erroneous conclusions, the trial court sanctioned by the affirmance of the judgment by the Circuit Court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision. Otherwise, the petitioner will be caused to liquidate a very substantial judgment against it without sanction of law and to which its actions did not contribute since respondents' damage had eventuated by the negligence of the respondent prior to any handling of the items at issue by the petitioner.

This case involved an interpretation of statutes which is of extreme importance to the banks and through the banks to the depositors and people of the State of Texas. A universal custom obtains throughout the banking business for the handling of the items in the way and manner in which petitioner did handle them. Such customs should not be done away with by judicial legislation. Unless the legislative intent is clearly deducible in support of the judgment at issue herein the judgment should not be permitted to stand.

This case is one of primary consideration. The only case cited by the trial court, that of *City State Bank v. National Bank of Commerce, 261 S. W. 2d 749*, is clearly distinguishable. The cited opinion is by a Court of Civil Appeals. Therein the drawee bank had received and accepted a special deposit to pay the particular check in question. The drawee bank received the check, accepted, gave credit therefor and subsequently attempted to revoke the acceptance and payment. The revocation attempt was without the

giving of notice in the time and manner required under Article 342-704.

It may also be noted that the check in the cited case had no title papers attached to be presented to the drawer for acceptance and approval. In the instant case the existing universal custom requires this type of item to be handled as collection paper. Likewise, the express instruction of the forwarding bank was to handle as a collection item. Both the latter types of transactions are within the terms of Article 342-703.

There is another glaring departure from the accepted law in the judgment at issue. The action of the respondents is a suit for damages for breach of an alleged statutory duty. Necessary to this cause of action is a showing by the respondents of some resultant legal damage occurring by reason of petitioner's breach of the alleged statutory duty. The damage and injury must concur. *1 American Jurisprudence 422.* The loss must be the direct result of or proximately traceable to an obligation owing to a plaintiff. *1 American Jurisprudence 423.* If the plaintiff's own act is the cause of defendant's violation of the statute there can be no recovery. *50 American Jurisprudence 586.* It is a fundamental rule that to warrant recovery for the breach of a statutory duty the violation must have been a causa sine qua non. *50 American Jurisprudence 587. Worsham Buick Company v. Mettie K. Isaacs, et al., 51 S. W. 2d 277; 86 A. L. R. 232; Osage Oil & Refining Company v. W. R. Chandler, 287 Fed. 848; Klinkenstein v. 3rd Avenue Railway Company, 158 N. E. 886, 54 A. L. R. 69; Franklin v.*

Houston Electric Company, 286 S. W. 578, 580. If the injury would have occurred regardless of the violation of the law there is no liability because of the violation. *20 R. C. L. 43; Hover & Co. v. D. & R. G. W. Co., 17 Federal 2d 881, 886.*

The trial court found that respondents' damage was caused by their own acts and negligence. (R. 33.) This negligence occurred long prior to the time the petitioner received the items. All the autos involved were sold by Camp to innocent purchasers on or before September 11, 1953. (R. 29.) All the drafts involved were received by petitioner on September 14, 1953. (R. 28.) In no way could the failure to give notice under the statute by the petitioner have produced the injury. The respondents presented the drawer of the drafts in question as a witness and his testimony shows him insolvent at the time of which complaint is made. (R. 112.)

CONCLUSION

By reason of which it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

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Counsel for Petitioner.

Of Counsel:
WM. D. LAWRENCE, JR.,
F. LEE LAWRENCE.

I, the undersigned attorney for the petitioner in the above styled and numbered cause, certify that a copy of this Petition for Writ of Certiorari was delivered personally by me to Charles F. Potter, Esquire, one of the attorneys of record for the respondents herein, on October ..., 1955.

.....

W. DEWEY LAWRENCE.

APPENDIX ONE

Before RIVES, Circuit Judge, and DAWKINS and DeVANE, District Judges.

DeVANE, District Judge: This is an appeal from a judgment in favor of appellees against appellant entered July 29, 1954. Appellees sued appellant on four drafts, alleging appellant was liable for the face amount of said drafts on three alternative grounds: (a) Appellant by holding the drafts more than twenty-four hours accepted same; (b) Appellant extended the drawer credit to the extent of the drafts so as to be bound and obligated therefor, and (c) Appellant was negligent in the handling and failure to return the drafts. Appellant denied its liability on all grounds and set up, in addition, certain affirmative defenses. The case was tried to the court without a jury and in a very clear memorandum decision, not yet reported, the trial court carefully reviewed the evidence and found and held appellant liable by reason of its holding of the drafts for a time longer than permitted by Article 342-704, Revised Civil Statutes of Texas.

We have carefully reviewed the record before us and the memorandum decision of the trial court and find ourselves in entire accord with the decision of the trial court in so far as it pertains to appellant's liability to appellees under the controlling Texas law. The facts are long and somewhat complicated and the parties are in agreement that they are fully and accurately stated in the memorandum decision of the trial court. Therefore, no useful purpose would be served by their restatement here.

Being convinced that the District Court correctly found the facts and applied the applicable law and that the judgment entered is right, it is AFFIRMED.

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REPLY TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS OF THE COURTS BELOW

The opinion of the Circuit Court of Appeals is reported in 224 F (2) 687.

The opinion of the District Court is not reported. It appears in the Record on Page 17.

STATEMENT

The opinion of the District Court gives a full statement of the facts.

ARGUMENT

Point No. 1

THE TRIAL COURT PROPERLY HELD THAT ARTICLE 342-704, REVISED CIVIL STATUTES OF TEXAS CONTROLS THE CASE; BY HOLDING THE DRAFTS MORE THAN TWENTY-FOUR HOURS THE BANK ACCEPTED THE SAME.

In the course of the trial Respondent (plaintiff) abandoned the alternative grounds for relief and relied solely on Paragraph VIII (a) of the Complaint (R. 4) alleging that Petitioner (defendant) had accepted the drafts by holding them more than twenty-four hours.

These drafts were actually in the form of checks. The drawer was J. C. Motors; the drawee was the Tyler Bank & Trust Company and they were payable to plaintiff. They were printed on an envelope which contained automobile title papers, but there was no requirement that drawee should approve the enclosed papers. (See original Exhibits P-3, P-4, P-5 and P-6) The only difference in these so-called drafts and the ordinary check is the arrangement of the printed matter.

They were forwarded to the Tyler Bank & Trust Company by the Worthen Bank & Trust Company of Little Rock, Arkansas, with its "cash letter" (original Exhibit P-12, Record 150-1), which contained the following statement:

"We enclose for collection and remittance when paid. Please do not hold collections for the convenience of parties. 'Do not protest items of $500 or less. Protest dishonored items of $500.01 or over, except those bearing on their face this stamp (N. P. 81-7) or a similar stamp of a preceding bank endorser.' 'Wire (giving name of our endorser) non-payment of all items of $1,000 or over, except those not paid because of missing, irregular or unsatisfactory endorsement and those bearing on their face 'DO NOT WIRE NON-PAYMENT' accompanied by the A.B.A. transit number of this bank or of a preceding bank endorser.' "

The Tyler Bank violated these instructions. It failed to wire non-payment. Although it was continually in touch with Johnny Camp (J. C. Motors) during the holding over period, it nevertheless held them for Camp's convenience from September 14 to September 18, 1954 when they were returned unpaid. It appears that Camp was in the bank handling other drafts on September 14, 16 and 17, 1954. (Record 202, 211). And he was advised of these drafts, but for some unexplained reason the Bank held them over without insisting on payment (Record 211).

Long prior to the enactment of the Texas Banking Act, the Negotiable Instrument Law (Article 5941, section 137, Revised Civil Statutes of Texas) required that where a bill "is delivered for acceptance" but the drawee fails to either accept or return it within twenty-four hours "he will be deemed to have accepted the same." The distinc-

tion was drawn between items presented for *payment* and those presented for *acceptance* and the provision was held to be applicable only to the latter. In line with this the Commission of Appeals of Texas in an opinion adopted by the Supreme Court held the provision inapplicable to the ordinary check presented for payment. *First National Bank of Goree vs. Talley*, 285 S. W. 612. The court recognized that if the check had been presented for acceptance instead of for payment this provision of the Negotiable Instrument Law would have required a holding that the item had been accepted.

Accord: 9 C.J.S. 690.

In 1943 the Texas Legislature enacted the Texas Banking Act which was designed to cover banking transactions just such as we have in this case. Articles 342-703 and 342-704 Revised Civil Statutes gave definite guidance to banks handling any item. By Article 342-701 (d) an "item" is defined to mean "a check, note or other negotiable or non-negotiable instrument providing for the payment of money".

Articles 342-704 which controls our case, makes no distinction between items presented for payment or acceptance. "Presentment" alone is referred to, clearly showing that it was intended to be more broad than Section 137 of the Negotiable Instrument Act.

It was in light of this law that the Court rendered its decision in *City State Bank in Wellington vs. National*

Bank of Commerce, Fort Worth Court of Civil Appeals, 261 S. W. 2d 749, writ of error refused NRE. The Court said:

> "The proper construction of Art. 342-704, Vernon's Ann. Civ. St., seems to be that in order to escape liability for the amount of an item presented to a drawee bank by mail, and the drawee bank determines that it is not obligated at the time of presentment to pay it, it must, during the day the item is presented, or within twenty-four hours after presentment, deposit the item in the mail, properly stamped and addressed to the bank or the person presenting the same. The checks were received by appellant between eight and ten o'clock A.M., February 28, and they were deposited in the mail late in the afternoon of the 29th. Obviously, they were not deposited in the mail on the day they were presented, nor within twenty-four hours after presentment."

This is the only Texas case and controls ours.

A good discussion of the Texas Bank Act is found in 32 Texas Law Review Pages 259, 288-295. The Article is written by Keith E. Morrison and Joseph T. Sneed, both professors of law at the University of Texas and is extensively annotated. A material portion of that article reads:

> "• • • after the twenty-four hour period from presentment, the drawee becomes liable to the owner of the item at the option of the latter. In support of this conclusion, it appears that Article 342-704 comprehensively states the liability of the drawee bank to the owner, as the presenting party, by proving, '. . . items presented to a drawee bank shall be receiv-

ed by it, subject to final adjustment. . .' and, 'If the drawee bank in refusing payment of any item fails to comply with the provisions of this article within the time above prescribed it shall, at the election of the owner of the item, be deemed to have accepted the item, and shall be liable for the amount thereof.' "

"The term 'any item' appears to refer to the initial requirement that the drawee bank receive items presented to it and not merely to instances where the drawee makes a conditional settlement or to instances involving presentment by mail. Similarly, the phrase, 'in refusing payment,' does not appear to be limited merely to instances where there has been a conditional settlement but appears to include also instances where the drawee holds the item without taking further action toward payment. Moreover, 'refusing payment' refers to a failure to comply with the provisions of the section and not merely to a refusal to return the item. Thus, the meaning of Article 342-704 is more definite than is that of Section 137 of the NIL, which is frequently interpreted to mean that mere retention of the item is not a refusal 'to return' the item and that the presenting party must show facts in addition to the mere lapse of time in order to hold the drawee liable." (Page 293)

It is suggested by petitioner (defendant) that we have a case based on breach of a statutory duty and that plaintiffs' damages are restricted to those proximately caused by the breach of duty. (Petitioner's brief Pages 10-11.) The argument is not in point because it applies only to torts arising from breach of statutory duties. Ours is a suit on a contract arising from acceptance of the drafts.

The Banking Act says that failure to return the item within twenty-four hours constitutes an acceptance. This is as much an acceptance as if the drawee had written its acceptance on the face of the instrument.

It is a matter of viewing the conduct of the parties in the light of the statute as evidencing the formation of a contract.

In *Winder Bros. vs. Sterling* (Com. App.) 12 S. W. 2d 127 the court states what we believe to be the principle of law applicable to this situation:

> "The laws which subsist at the time and place of the making of the contract and where it is to be performed, * * * enter into and form a part of it, as if they were expressly referred to, or incorporated in its terms." (Page 128)

In *Empire Gas and Fuel Company vs. State* (S. Ct.) 47 S. W. 2d 265, the court says:

> "It is a rule in this state that, where a contract is made, like the one under consideration, with reference to the performance of certain acts prescribed by statute, the contract and statute will be considered together, and, in view of the language of the statute that all sums of money owing the state 'shall be due and payable to the Commissioner at Austin,' is considered to be a contract in writing to perform an obligation in Travis County, Texas." (Pages 266-267)

And in *Southland Life Insurance Company vs. Hopkins* (Am. CCA) 219 S. W. 255, there is this statement:

> "It is a fundamental rule that contracting parties are conclusively presumed to have entered into their contract with full knowledge of all existing laws upon the subject which may affect the validity, formation, performance, operation, discharge, interpretation, or enforcement thereof, and that such laws enter into and become a part of the contract binding the parties." (Page 260)

With reference to the Negotiable Instrument Act and dealing with the legal effect of an endorsement in blank, the court in *Ford vs. Smith*, 274 S. W. 166, 167 says that:

> "The rights of the parties to this suit are governed by the provisions" of the Negotiable Instrument Act.

The fact that the drafts were a means of paying the purchase price of the automobiles is entirely immaterial in determining whether the drafts had been accepted. It is immaterial whether the seller of the cars used good judgment in delivering possession before actually receiving the purchase price, immaterial whether the seller may have been unwise in trusting the purchaser. It would be the same had the seller actually completed the sale and delivery of the cars upon an open credit followed by the drawing of the drafts to pay the account.

The material question is whether the drafts have been accepted by the drawee. There is ample consideration to support the transaction. In determining whether the

drawee's conduct is an acceptance it is immaterial what disposition the purchaser may have made of the automobiles.

Point No. 2

THE TRIAL COURT PROPERLY HELD THAT BANKING CUSTOM COULD NOT STAND IN CONTRADICTION OF THE STATUTORY LAW.

In the Trial Court Harold Stringer, Vice President of the Tyler Bank & Trust Company, testified that it was customary in the banking business for the drawee bank to hold items more than twenty-four hours in an effort to effect a collection. We did not attempt a rebuttal of this evidence because it was in patent conflict with the Texas Banking Act and with the written instructions from the Worthen Bank & Trust Company to the Tyler Bank.

But he said further if the item was received by one of the other banks in Tyler and presented for collection to the Tyler Bank & Trust Company it must be handled within twenty-four hours. (Record 238) The same was true, he said, if the item came through the Federal Reserve System (Record 256-7). Only where the draft was mailed for collection direct to the Tyler Bank & Trust Company did it feel free to hold it beyond twenty-four hours. The only conclusion which can be drawn from this testimony is that the Tyler Bank felt free to hold the item for the accommodation of its customer where it was entirely

in control of the situation, but that if other banks or the Federal Reserve System had control, they would follow the twenty-four hour rule. This disproves the alleged custom.

The complete answer, however, is that custom will not be allowed to prevail against the affirmative provisions of law or public policy. We refer to Article 342-704 of the Texas Banking Act.

Missouri Pacific Railway Co. vs. Fagan (Tex. Sup. Ct.), 9 S. W. 749, 751, *Alliance Insurance Co. vs. Continental Gin Co.* (Com. of App.) 285 S. W. 257, 260, *Peaslee Gaulbert Corp. vs. Hughes* (Dallas CCA) 79 S. W. 2d 149, 151, writ of error refused, 42 *Tex. Jur.* 837.

It is respectfully submitted that the Petition for Writ of Certiorari should be denied.

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I hereby certify that a copy of this brief has been delivered to W. Dewey Lawrence, Tyler, Texas, the attorney of record for Appellant, this 7 day of Nov. 1955.

Chas. F. Potter

Chas. F. Potter

APPENDIX A

Article 342-701 (d). The term "item" means a check, note or other negotiable or non-negotiable instrument providing for the payment of money.

Article 342-703. Collections—Scope of Agency—Liability of Agents.

The original agent and each subagent, in the course of the collection of an item, shall, as agents of the owner of the item, be authorized:

1. To effect collection by or through: (a) forwarding the item to the drawee, if the drawee is a bank; or (b) forwarding the item to another bank for collection, which bank upon receiving the item shall become a subagent within the preview of this chapter; or (c) presenting the item across the counter of the drawee bank; or (d) presenting the item through any clearing house, or other established and recognized procedure or banking custom.

2. To receive the check or draft of the drawee, if a bank, or the check or draft of any other bank, as a step in the process of payment of the item.

3. To receive the check or draft of any subagent or of any other bank as a step in the process of transmitting the proceeds of the item from one agent to another.

4. To transmit an item or a remittance by mail, express or by any other common carrier in accordance with established banking custom.

5. To give reasonable instructions not in conflict with law or established banking customs and procedure, relative to the method of collection, payment and transmittal of the proceeds. The original agent and each subagent shall be liable for damages proximately caused by its own negligence, wrongful act, or breach of contract in connection with the collection of an item, in a sum not exceeding the amount of such item, but shall not be liable or responsible for the acts or omissions of any other agent or person or for the loss or destruction of any item or any remittance in the mail or while it is in the hands of any other common carrier or person. Further provided that no agent or subagent shall be deemed guilty of unreasonable delay if it forwards an item or remittance during the day on which it is received or during business hours of the following day. Acts 1943, 48th Leg., p. 154, ch. 97, subch. VII, art. 3.

Article 342-704. Collections — Payment — Refusal — Dishonor.

Except where otherwise provided in this Code, or by express agreement of the parties, items presented to a drawee bank shall be received by it, subject to final adjustments and all clearing house settlements, checks, drafts, credits, advances of money, charges or entries to accounts, (including sight posting), shall be conditional and subject to revocation during the day on which the item is presented (or in case of a time item, the due date),

or within twenty-four (24) hours after presentment, exclusive of Sundays and holidays, if it is finally determined that the drawee bank was not at the time of presentment (or in case of a time item, the due date) authorized or obligated to pay the item, and if the drawee bank shall within that time refuse payment and return the item, or undertake to give notice in the manner hereinafter prescribed:

1. If the item is presented across the counter for payment in cash or for deposit in the drawee bank, the drawee bank shall exercise reasonable diligence within the time above prescribed to give notice, by mail or otherwise, to the bank or person presenting the item that it has refused payment and that it holds the item subject to its or his order.

2. If the item is presented through a clearing house, the drawee bank shall, within the time prescribed, return the item to the clearing house presenting it.

3. If the item is presented by mail, the drawee bank shall within the time above prescribed deposit the item in the mail properly stamped and addressed to the bank or person presenting the same. The actual receipt of the notice provided under Section 1 above by the bank or person presenting the item, or the actual receipt of the returned item by the person, bank or clearing house, as provided in Section 2 and 3 above, shall constitute dishonor within the purview of Article 5938 of the Revised Civil

Statutes of Texas. If the drawee bank in refusing payment of any item fails to comply with the provisions of this article within the time above prescribed it shall, at the election of the owner of the item be deemed to have accepted the item, and shall be liable for the amount thereof. If an item is presented by a bank as agent or subagent of owner, such bank may, in the absence of definite instructions from the owner, exercise the election herein provided for. Acts 1943, 48th Leg., p. 154, ch. 97, subch. VII, art. 4.

Article 5941, Sec. 137

Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same.